In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN AND FELIX ANTONIO ALDERISIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FROM THE DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners Alderman and Alderisio[1] seek a rehearing of the order of October 9, 1967, denying their petition for a writ of certiorari.

1. This case involves a conspiracy between 1961 and 1962 to transmit in interstate commerce communications containing threats to injure and murder Robert Sunshine.[2] It grows out of efforts of petitioner Kolod, now deceased, and petitioner Alderman to use threats to recoup money from their association with Sunshine

[1] Since petitioner Kolod died in August 1967, the petition for a writ of certiorari, as to him, should be dismissed.

[2] The facts are detailed in the opinion of the court of appeals, reported at 371 F. 2d 983, and in our brief in opposition.

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in an oil venture. During the course of the conspiracy, on July 6, 1961, petitioner Alderisio appeared at Sunshine's office in Denver and told Sunshine that Kolod had sent him to kill Sunshine. Alderisio did not testify.

In the petition for rehearing (p. 11) petitioners' counsel states that he has been informed that petitioner Alderisio's place of business in Chicago was the target of electronic surveillance and that "[i]f the surveillance was conducted during the time counsel is informed it was conducted, it is certain to have monitored conversations between counsel and Alderisio." As *Black* v. *United States*, 385 U.S. 26, *O'Brien* v. *United States*, 386 U.S. 345, and *Granello* v. *United States*, 386 U.S. 1019, illustrate, however, the government is now committed to the disclosure of any interception of a communication between a defendant and his attorney in a pending case whether or not the conversation is believed relevant to the issues in the case. The government has not intercepted any communications between counsel and Alderisio.[2] We also advise the Court that no overheard conversation in which any of the petitioners participated is arguably relevant to this prosecution.

We note additionally that the facts of record negate the likelihood of any undisclosed taint. The gist of the case involves threatening conversations between Kolod and Alderman and the victim. Sunshine testified at

[2] If petitioners dispute this denial and have evidence which they wish to present, obviously they are not precluded from seeking appropriate relief in the district court.

the trial that, while he was awaiting sentence on criminal charges, he told law enforcement officials about these threats (1 R. 165). The source of the government's information concerning this offense is patent.

So far as relevant to petitioners' claims, it is the policy of the Department of Justice to make disclosure to the courts if it finds (1) that a defendant was present or participated in a conversation overheard by unlawful electronic surveillance, and (2) that the government has thereby obtained any information which is arguably relevant to the litigation involved. We believe that this policy conforms to established principles of criminal law with respect to the prosecution's role in the administration of criminal justice. We submit that there are two aspects to the prosecution's duty to make a disclosure. It extends (1) to information which has arguable relationship to the case involved, and (2) does not include information which has no connection with the matter being prosecuted. The second of these aspects is important, both to protect the courts from the burden of examining irrelevant material, and to protect other persons who have no connection with the pending litigation.

In resolving this problem, a line obviously has to be drawn somewhere. The argument made by the petitioners that the Department is (Pet. for Rehearing, p. 10) seeking to be "judge of its own cause" is plausible and appealing. But it is too facile and superficial. Prosecuting authorities are officers of the Court.

They are constantly called on to make judgments which affect the administration of justice. If, for example, the prosecuting officers were to advise the Court that there was no record of any surveillance in a particular case, it would be hard to go beyond the certificate. Surely, counsel for the accused would not be allowed to go through all records and papers of the Department of Justice to show the contrary, because, among other things, those records and papers are wholly irrelevant, and the Department has an obligation, in the administration of justice, to keep them confidential, and not to disclose facts about other persons which might injure them, with no possible application to the particular case.

In an effort to deal with the problems involved, the Department has taken careful steps, and has formulated a definite policy, of which this Court has been advised. In the supplemental memorandum in *Schipani v. United States*, No. 504, O.T., 1966, it was stated (at p. 5):

> Recognizing its obligation not to use evidence in violation of a defendant's protected rights in any criminal prosecution, the Department has initiated a program to discover prior instances in which this may have occurred. An extensive review is presently being conducted in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial * * *. The government will promptly notify the appropriate court when any material discovery is made.

Thereafter, in order to assure faithful and uniform implementation of the Department's policy, the Attorney General established a Committee charged specifically to handle this question. The Memorandum of the Acting Attorney General establishing this Committee is reproduced as an Appendix (page 11, *infra*). The Committee consists of the Solicitor General and three Assistant Attorneys General. Although the memorandum says that these officers may be represented by their "designees," these officers have in fact ordinarily participated in person, except that Mr. Ralph S. Spritzer, the First Assistant in the Solicitor General's Office, has been the representative of that office when he has been Acting Solicitor General. This Committee has met frequently for more than a year. It reviews cases in which a defendant has been overheard by unlawful electronic surveillance, whether he was the direct object of surveillance or not. This committee has followed the precept that a conversation of a defendant overheard by such means shall be disclosed to the appropriate court if arguably relevant to the litigation involved.

The Court should be advised that the character of material is such that the members of this Committee, or any one of them, are not able to read personally every word. Instead they necessarily rely on reviews and reports made by subordinate personnel in the Department of Justice. In each case the persons making the detailed examination are lawyers, subject to professional standards, carefully chosen by their superi-

ors. They report in detail on what they find, and put specific items or passages before the Committee for its examination and consideration.

In this case, the review was made by two experienced lawyers on the legal staff of the Department of Justice. The Solicitor General has talked with both of them, one in person, and the other by telephone, as he is now in a distant part of the country. In each case, the Solicitor General is satisfied that the examination was carefully, understandingly, and conscientiously made, and that an accurate reflection of the material in question has been presented. In addition the Solicitor General has himself gone over the material, and has read much of it, and has read all passages which were brought to his attention as having any bearing on the Department's policy as stated above. As a result of his inquiries and examination, he is satisfied that there is nothing that is arguably relevant to the present case.

In undertaking to notify the court whenever it found it had information of arguable relevance to the litigation, the Department of Justice went beyond the requirements of disclosure established by such cases as *Brady* v. *Maryland*, 373 U.S. 83, and *Giles* v. *Maryland*, 386 U.S. 66. In *Brady*, this Court said (373 U.S. at 87): "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment * * *." Implicit in this decision is the premise that the prosecutor must decide what is material evi-

dence that must be disclosed and what is immaterial evidence that need not be disclosed. It has never been thought necessary for the trial judge to examine the government's files in every case to determine whether all *material* evidence has been disclosed.

In practically every criminal case the prosecution must decide whether information in its files calls for notification to the court or the defense. If a particular witness is not called, the prosecution must determine whether the witness could give relevant testimony which would be favorable to the accused. If so, the name of the person interviewed may have to be disclosed to the defense. The prosecution always has the duty to separate material which arguably might be said to have a connection with the case being tried from material which has no such relationship.

The fact that the prosecutor must exercise judgment over disclosure is recognized by the Federal Rules of Criminal Procedure. Rule 16 does not require the government to turn over material which has no relationship to the criminal prosecution. Rather, it authorizes the court, upon motion of a defendant, to permit the defendant to inspect and copy any "relevant" papers in the possession of the government including "written or recorded statements or confessions made by the defendant" and his recorded testimony before the grand jury. The prosecutor, therefore, must first decide what is relevant.

Similarly, the prosecutor is often called upon to make an initial determination of relevancy when responding to demands for the grand jury testimony of

a witness or for statements which must be produced under the Jencks statute, 18 U.S.C. 3500. If the witness has given information in several unrelated cases and there is room for argument as to whether a particular statement may or may not relate to the facts of the case on trial, the arguably relevant statements are shown to the court for its decision. However, it has never been suggested that the prosecution should produce, or the courts be required to examine, all statements given by a person which may be in the government files even though they bear no relationship to the particular case.

The government has not been niggardly in its interpretation of what is arguably relevant. Of the 11 cases[4] in which the government has made disclosure of arguably relevant material, but has contended that the surveillance did not taint its case, taint has not been found in any instance.[5]

In a memorandum dated November 3, 1966, addressed to all United States Attorneys, the then Acting Attorney General, Ramsey Clark, stated the De-

[4] *United States* v. *Randazzo* (W.D.N.Y.); *United States* v. *Hoffa*, 278 F. Supp. 141 (N.D. Ill.); *United States* v. *McGarry*, (D. Mass.); *United States* v. *Kelley* (D. Mass.); *United States* v. *Kress* (S.D. Miss); *United States* v. *Carabbia*, 381 F. 2d 133 (C.A. 6), certiorari denied, No. 690, this Term, December 11, 1967; *United States* v. *Nolan* (N.D. Okla.); *United States* v. *Di Piazza* (S.D. Ohio); *United States* v. *Beckley* (S.D. Fla.); *United States* v. *Daddano* (N.D. Ill.); *Battaglia* v. *United States*, 383 F. 2d 363 (C.A. 9), petition for writ of certiorari pending, No. 867, this Term.

[5] There are seven cases in which there has been a disclosure but no final hearing.

partment's policy with regard to electronic eavesdropping: "This Department must never proceed with any investigation or case which includes evidence illegally obtained or the fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint or unfairness." The government has undertaken to implement that policy scrupulously and without thrusting upon the courts the burden of screening obviously irrelevant material.

For the foregoing reasons, it is respectfully submitted that the petition for rehearing should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

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